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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-350

UNITED STATES OF AMERICA, APPELLANT

v.

STATE TAX COMMISSION OF THE STATE OF MISSISSIPPI, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF MISSISSIPPI

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-23a) is reported at 340 F. Supp. 903.

JURISDICTION

The judgment of the district court (J.S. App. 24a) was entered on March 30, 1972. A notice of appeal to this Court (J.S. App. 25a-26a) was filed on May 1, 1972. On June 22, 1972, Mr. Justice Powell extended the time for docketing the appeal to and including August 29, 1972, and on that date the jurisdictional

statement was filed. Probable jurisdiction was noted on November 13, 1972 (App. 58).

The government instituted this action seeking: (1) a declaration that a statewide regulation was void because unconstitutional, (2) an injunction against state officials restraining the regulation, taxation, or control of purchases of alcoholic beverages by instrumentalities of the United States, and (3) a judgment for the amount previously paid under protest pursuant to the challenged regulation (App. 5–11). Accordingly, a three-judge district court was properly convened pursuant to 28 U.S.C. 2281 (*King* v. *Smith*, 392 U.S. 309, 312, n. 3), and this Court has jurisdiction under 28 U.S.C. 1253.

QUESTIONS PRESENTED

A regulation of the Mississippi State Tax Commission requires out-of-state liquor distillers and suppliers to collect "wholesale markups" on liquor sold to military officers' clubs and other nonappropriated fund activities located on bases within Mississippi and to remit these "markups" to the Tax Commission. The questions presented are:

1. Whether the Twenty-First Amendment authorizes Mississippi to regulate the importation of liquors into territory over which it has ceded exclusive jurisdiction to the United States.

2. Whether the Mississippi regulation imposes an unconstitutional state tax on instrumentalities of the United States.

3. Whether the regulation is invalid because it conflicts with federal procurement regulations and policies.

CONSTITUTIONAL PROVISIONS, STATUTE, AND REGULATION INVOLVED

1. Article I, section 8, of the United States Constitution provides in part:

> The Congress shall have Power * * *
> To raise and support Armies, * * *;
> To provide and maintain a Navy;
> To make Rules for the Government and Regulation of the land and naval Forces;
> * * * * *
> To exercise exclusive Legislation in all Cases whatsoever * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings * * *.

2. Article IV, section 3, provides in part:

> * * * * *
> The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *.

3. Section 2 of the Twenty-first Amendment provides:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

4. Section 10265–18(c) of the Mississippi Local Option Alcoholic Beverage Control Law, Miss. Code Ann. (Cum. Supp.) 10265–18(c), provides:

> The State Tax Commission is hereby created a wholesale distributor and seller of alcoholic

beverage, not including malt liquors, within the State of Mississippi. It is granted the sole right to import and sell such intoxicating liquors at wholesale within the State, and no person who is granted the right to sell, distribute, or receive such liquors at retail shall purchase any such intoxicating liquors from any source other than the Commission. The said Commission may establish warehouses, purchase intoxicating liquors in such quantities and from such sources as it may deem desirable and sell the same to authorized retailers within the State including, at the discretion of the Commission, any retail distributors operating within any military post or qualified resort areas within the boundaries of the State, keeping a correct and accurate record of all such transactions, and exercising such control over the distribution of alcoholic beverages as seem right and proper in keeping with the provisions and purposes of this act.

* * * * *

5. Section 10265–106 of the Mississippi Local Option Alcoholic Beverage Control Law, Miss. Code Ann. (Cum. Supp.) 10265–106, provides in part:

* * * * *

The Commission shall add to the cost of all alcoholic beverages such various markups as in its discretion will be adequate to cover the cost of operation of the State wholesale liquor business, yield a reasonable profit, and be competitive with liquor prices in neighboring states.

6. Regulation 25 of the Mississippi State Tax Commission provides:

Post exchanges, ship stores, and officers' clubs located on military reservations and operated

by military personnel (including those operated by the National Guard) shall have the option of ordering alcoholic beverages direct from the distiller or from the Alcoholic Beverage Control Division of the State Tax Commission. In the event an order is placed by such organization directly with a distiller, a copy of such order shall be immediately mailed to the Alcoholic Beverage Control Division of the State Tax Commission.

All orders of such organizations shall bear the usual wholesale markup in price but shall be exempt from all state taxes. The price of such alcoholic beverages shall be paid by such organizations directly to the distiller, which shall in turn remit the wholesale markup to the Alcoholic Beverage Control Division of the State Tax Commission monthly covering shipments made for the previous month.

STATEMENT

The material facts are not in dispute.[1] Mississippi prohibited the sale or possession of alcoholic beverages until 1966. In that year, it adopted a local (county) option policy subject to the requirement that the State Tax Commission be the sole importer and wholesaler of alcoholic beverages. Miss. Code Ann. (Cum. Supp.) 10265–01, *et seq.* The Commission was authorized to sell to licensed retailers in the state "including, at the discretion of the Commission, any retail dis-

[1] The case was submitted on a stipulation of facts (App. 28–41).

tributors operating within any military post * * * within the boundaries of the State, * * * exercising such control over the distribution of alcoholic beverages as seem [*sic*] right and proper in keeping with the provisions and purposes of this act." Miss. Code Ann. 10265–18 (c) (p. 4, *supra*). The statute directed the Commission to add to the cost of alcoholic beverages a "mark-up" which in its judgment would be adequate to cover the cost of wholesaling, to provide a reasonable profit, and to render prices competitive with those in neighboring states. Miss. Code Ann. 10265–106 (p. 4, *supra*).

Pursuant to this authority, the Commission promulgated Regulation 25 (originally numbered 22), which authorizes military post exchanges, ship stores, and officers' clubs to purchase liquor either from the Commission or directly from distillers. The regulation requires, on direct orders from such military facilities, that distillers collect and remit to the Commission the latter's "usual wholesale markup." During the period in issue, the wholesale markup was 17 percent on distilled spirits and 20 percent on wine (App. 37; J.S. App. 4a).

The officers' and noncommissioned officers' clubs and other nonappropriated fund activities on the four military bases in Mississippi had purchased liquor from distillers and suppliers when Mississippi was a "dry" state, and they decided to continue this practice rather than purchase from the Commission (App. 35–36). Two of these bases, Keesler Air Force Base and the Naval Construction Battalion Center, are federal en-

claves; exclusive jurisdiction over these lands was ceded to the United States by Mississippi, which retained only the right to serve civil and criminal process thereon. Miss. Code Ann. 4153, 4154. See App. 28–29; J.S. App. 3a, 7a. On the other two bases, Columbus Air Force Base and Meridian Naval Air Station, the federal government and the State exercise concurrent jurisdiction (App. 29; J.S. App. 3a, 29a).

Soon after the Mississippi regulation became effective, the military authorities commenced discussions with state officials in an unsuccessful effort to persuade them that the collection of the "markup" was improper. The military authorities also attempted to pay the amounts for the "markup" into an escrow fund until the matter could be judicially determined. The Commission, however, notified the distillers that if they did not remit the "markups" on their military sales to the Commission, the distillers would be subject to criminal prosecution (see Miss. Code Ann. 10265–112) and to delisting, *i.e.*, loss of the privilege of selling to the Commission for retailing in Mississippi (App. 36–38). To obtain liquor, therefore, the military facilities were required by the distillers to pay the "markup." By July 31, 1971, $648,421.92 had been paid under protest to suppliers outside Mississippi for such "markups" (App. 38).

The United States instituted this action on November 3, 1969, seeking a declaration that the regulation is unconstitutional, an injunction against its continued enforcement, and a judgment for the amount already paid for "markups."

The district court granted summary judgment against the government. It held that the constitutional grants of authority to Congress to establish and regulate military forces and to exercise jurisdiction over lands belonging to the United States "are diminished by the express prohibition of the XXI Amendment as to all packaged liquor transactions which (1) are made on exclusively federal enclaves but without restriction upon use and consumption of such liquors outside the base, or (2) take place on military installations over which the state and federal government exercise concurrent jurisdiction" (J.S. App. 2a). With respect to liquor sold by the drink on the four bases, the court made no express holding, but its judgment denied all relief to the government. Judge Cox added in a concurring opinion that a refund of the "markup" was also barred because those payments had been voluntarily made (J.S. App. 13a–23a).

SUMMARY OF ARGUMENT

I

Mississippi has no power under the Twenty-first Amendment to impose its "markup" with respect to the transportation of liquor from out-of-state distillers to the two military bases over which the United States exercises exclusive jurisdiction. The Amendment is inapplicable because, under its language, the liquor is not imported "into any State * * * for delivery or use therein." Even if otherwise applicable, the Amendment cannot support the regulation be-

cause it conflicts with the superior constitutional grant of power to Congress to regulate federal enclaves.

A. Under Article I, Section 8, Clause 17, Congress is given the power to "exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State" for the erection of military or other structures. This exclusive legislative power, even in the absence of specific action by Congress, bars state regulation of the price of goods sold to military clubs and exchanges on federal enclaves. *Paul* v. *United States,* 371 U.S. 245.

The lands constituting two of the four Mississippi bases—Keesler and Naval Construction—were acquired by condemnation with the express consent of the Mississippi legislature. We think that acquisition by condemnation constitutes a "purchase" within the meaning of Clause 17. But even if it does not, the transfer of legislative power was completed by Mississippi's statutory cession, and the United States' acceptance, of exclusive jurisdiction over the lands acquired. *Paul* v. *United States, supra.* Mississippi's 1966 "markup" regulation, adopted more than 15 years after the transfer of sovereignty was effected, is therefore barred, with respect to the ceded lands, under Article I, Section 8.

B. The result is not different here because of the Twenty-first Amendment. Section 2 of the Amendment, which prohibits the "importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof * * *," affords Mississippi wide latitude to legislate with respect to

alcoholic beverages in the State. It provides no authority, however, to regulate the importation of liquor from out-of-state distillers onto the two military bases over which the United States has exclusive jurisdiction. This is so because the transaction involves neither an importation of liquor "into any State," nor "delivery or use" within the State. All sales are made on the base to authorized personnel.

Collins v. *Yosemite Park Co.*, 304 U.S. 518, controls this aspect of the case. The Court there held that California could not require a company selling liquor within national park lands to apply for permits and pay taxes relating to its importation of liquor from out-of-state sources. As in *Collins*, the delivery and use of the liquor here is exclusively on lands over which the State has no jurisdiction. Although the court below found that some of the liquor sold on the bases here was consumed off the federal enclave, there is no reason to think that the same was not true in *Collins*. That alcoholic beverages purchased on the bases may be consumed off the bases does not give the State any added power to regulate the distiller's sales to the base.

Even if the distiller's sales to the facilities on the Keesler and Naval Construction bases could be viewed as involving importation of liquor into Mississippi for delivery or use therein, the Twenty-first Amendment could not support a regulation that conflicts with the exclusive congressional power under Article I, Section 8, Clause 17, to regulate federal enclaves. Because there is nothing in the history or language of the

Amendment to suggest that it was intended to diminish that exclusive congressional power, the Amendment must be subordinated to the specific conferral of authority in Article I. Cf. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341.

II

Even if Mississippi's regulatory authority under the Twenty-first Amendment extends to all four military installations, the particular regulation here imposes an unconstitutional tax on instrumentalities of the United States. The "markup" that Mississippi requires out-of-state distillers to collect from the military facilities is a tax in return for which no services are rendered by the State. And, though collected for the State by the distillers, the legal incidence of that tax falls on the military facilities which must pay it.

Those facilities are instrumentalities of the United States entitled to immunity from state taxation. Their mission—promoting the morale and efficiency of military personnel by providing recreational and social facilities—is necessary to the proper functioning of the armed forces. Although the facilities operate with nonappropriated funds, no person has a financial interest in their profits or assets, and all operating gains are passed on to patrons.

The immunity of these federal instrumentalities from state taxation is not vitiated merely because the "markup" regulation is related to alcoholic beverages. The immunity doctrine, established by *M'Culloch* v. *Maryland*, 4 Wheat. 316, is a fundamental constitu-

tional principle deeply rooted in the concept of federalism. There is nothing in the history of the Twenty-first Amendment to suggest a purpose to abrogate this firmly established constitutional rule; where the Amendment collides with it, the Amendment must give way (cf. *Department of Revenue* v. *James B. Beam Distilling Co., supra*), particularly where, as here, the State's interest is only in raising revenue and its regulation is only remotely related to the health and welfare of its citizens.

III

The regulation is also invalid, under the Supremacy Clause, because the "markup" requirement conflicts with federal procurement regulations and policies. In *Paul* v. *United States, supra,* 371 U.S. at 252, this Court invalidated a state minimum price regulation for milk as applied to military installations which were directed by statute and regulation to purchase on the "most advantageous" terms, "price, quality, and other factors considered." Under the Supremacy Clause, "the state policy of regulated prices" was subordinated to "the federal policy of negotiated prices."

The regulations governing the purchase of alcoholic beverages for military installations reflect a similar federal policy, with which Mississippi's "markup" conflicts. Congress, pursuant to its powers to recruit and maintain the armed forces and to regulate military affairs, has given the Secretary of Defense broad authority to regulate the purchase and sale of alcoholic beverages for military installations, and the Secretary

has directed that purchases "shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." By inflating prices some 20 percent, the Mississippi "markup," like the state price regulation in *Paul,* frustrates the federal procurement policy of securing the most favorable terms. Under the Supremacy Clause, therefore, the state regulation is invalid.

Again, the Twenty-first Amendment, designed only to reinforce the states' authority over the public health and welfare and not to qualify the congressional authority over military affairs, must yield to the explicit grants of power to Congress to govern the armed forces of the United States.

ARGUMENT

I

MISSISSIPPI HAS NO POWER UNDER THE TWENTY-FIRST AMENDMENT TO REGULATE THE IMPORTATION OF INTOXICATING LIQUORS INTO THE TWO BASES OVER WHICH THE UNITED STATES HAS EXCLUSIVE JURISDICTION

A. THE UNITED STATES HAS EXCLUSIVE LEGISLATIVE POWER OVER TWO OF THE BASES UNDER ARTICLE I, SECTION 8, CLAUSE 17, OF THE CONSTITUTION

Article I, Section 8, Clause 17, of the Constitution empowers Congress to "exercise exclusive Legislation * * * over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings." In *Paul* v. *United States,* 371 U.S. 245, the Court held

that this clause barred the enforcement of a California minimum price regulation with respect to milk purchased out of nonappropriated funds by military installations in the State for resale at commissaries, military clubs, and post exchanges. The Court held that the California statute could not constitutionally be applied to such sales even though there was no conflicting federal regulation, because "the grant of 'exclusive' legislative power to Congress over enclaves that meet the requirements of Art. I, § 8, cl. 17, by its own weight, bars state regulation without specific congressional action" (371 U.S. at 263). See, also, *Pacific Coast Dairy, Inc.* v. *Department of Agriculture,* 318 U.S. 285, upon which the Court relied in *Paul,* holding that California could not revoke the license of a milk dealer who sold milk below the statutory minimum to a military installation located on a federal enclave. The Court in *Paul* also ruled that "[s]ince a State may not legislate with respect to a federal enclave unless it reserved the right to do so when it gave its consent to the purchase by the United States, only state law existing at the time of the acquisition remains enforceable, not subsequent laws" (371 U.S. at 268).

The principle announced in *Paul* governs the present case. The lands constituting the Keesler and Naval Construction bases were "purchased by the Consent of the Legislature" of Mississippi. The State by statute has expressly given its "consent * * * in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution o f the United States,

to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state * * * for * * * other public buildings."[2] The United States acquired the lands by condemnation between 1940 and 1949,[3] and formally accepted exclusive jurisdiction, pursuant to 40 U.S.C. 255,[4] by letters from War Department officials to the governors of Mississippi during 1942 to 1950 (App. 28–29).

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[2] Miss. Code Ann. 4153 provides:

"§ 4153. United States may acquire land for certain purposes

"The consent of the state of Mississippi is given, in accordance with the 17th clause, 8th section, and of the 1st article of the Constitution of the United States, to the acquisition by the United States, by purchase, condemnation or otherwise, of any land in this state which has heretofore been or may hereafter be acquired for custom houses, post offices, or other public buildings."

[3] See App. 28–29 and Exhibits 1–3 to the stipulation of facts.

[4] This section provides in part:

"Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted."

We think acquisition by condemnation is a "purchase" within the meaning of clause 17, and that Mississippi's statutory consent to "acquisition by * * * condemnation" therefore constituted a transfer of sovereignty. But even if the acquisition was not a "purchase," the district court found (J.S. App. 3a) and Mississippi apparently concedes (Motion to Affirm or Dismiss, p. 5), that the State ceded to the United States exclusive jurisdiction over the lands composing the two bases, retaining only the right to serve process thereon. Mississippi's express cession of "exclusive jurisdiction * * * over any land * * * acquired by the United States" for public buildings[5] was by itself sufficient to complete the transfer and give Congress sole authority over the lands. *Paul* v. *United States, supra,* 371 U.S. at 264; *Fort Leavenworth R.R. Co.* v. *Lowe,* 114 U.S. 525, 531, 541–542.[6]

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[5] Miss Code Ann. 4154 provides:

"§ 4154. Jurisdiction

"The exclusive jurisdiction in and over any land which has heretofore been, or may hereafter be, so acquired by the United States is hereby ceded to the United States for all purposes, except that the state retains the right to serve thereon all civil and criminal processes issued under authority of the state; but the jurisdiction so ceded shall continue no longer than the United States shall own such lands, for the purposes hereinabove set forth."

The reference of the section is to the purposes stated in Section 4153, *supra*, note 2.

[6] Where the federal government's acquisition is not a purchase with the consent of the state legislature, "it was held in *Ft. Leavenworth R. Co.* v. *Lowe*, 114 U.S. 525, 541, 542, that a State could complete the 'exclusive' jurisdiction of the Federal Government over such an enclave by 'a cession of legislative authority and political jurisdiction.'" *Paul* v. *United States, supra*, 371 U.S. at 264.

Once the United States had acquired the lands and accepted Mississippi's cession of jurisdiction, Article I, Section 8, Clause 17, "by its own weight, bar[red] state regulation * * *" (*Paul, supra*). Since exclusive federal jurisdiction attached to these lands by 1950 and since in ceding jurisdiction the State reserved authority only to serve process thereon, the State's 1966 regulation "was not enforceable on a federal enclave in [Mississippi] because it was adopted 'long after the transfer of sovereignty'" (*Paul, supra*, 371 U.S. at 268–269).

B. THE TWENTY-FIRST AMENDMENT DOES NOT EMPOWER THE STATE TO REGULATE THE IMPORTATION OF ALCOHOLIC BEVERAGES INTO THESE TWO BASES

Paul, of course, did not involve the Twenty-first Amendment, section 2 of which prohibits the "transportation or importation into any State * * * for delivery or use therein of intoxicating liquors, in violation of the laws thereof * * *." But this provision does not authorize Mississippi to regulate the importation of intoxicating liquors onto the two military bases over which the United States has exclusive jurisdiction. The State does not have that authority, because such importation is not "into [the] State * * * for delivery or use therein" as those terms are used in the Twenty-first Amendment, and because the Twenty-first Amendment was not intended to modify the exclusive jurisdiction over federal enclaves which Congress has under Article I, Section 8, Clause 17.

1. *The Amendment is inapplicable because the transaction between the out-of-state distiller and the mili-*

*tary facility is not "importation into any State * * * for delivery or use therein of intoxicating liquors."*

a. The court below properly recognized that, apart from the reserved right to serve process (J.S. App. 7a):

> These lands [Keesler and Naval Construction] are to Mississippi as the territory of one of her sister states or a foreign land. They constitute federal islands which no longer constitute any part of Mississippi nor function under its control.

It follows, as the court below acknowledged (J.S. App. 7a–8a), that "[t]he importation of property onto these bases for use thereon would clearly be outside the ambit of the XXI Amendment." This is the settled rule established by *Collins* v. *Yosemite Park Co.*, 304 U.S. 518. In that case a company operating hotels, stores, and camps in Yosemite National Park, under contract with the Secretary of the Interior, sought to enjoin the enforcement of a California liquor law which would have required the company to apply for permits and pay fees and taxes relating to its importation of alcoholic beverages for storage and sale within the park. Because "jurisdiction over the Yosemite National Park is exclusively in the United States except as reserved to California,[7] * * * [and as] there is no reservation of the right to control the sale or use of alcoholic beverages, such regulatory

[7] Unlike Mississippi, California in its cession of jurisdiction over the park land had expressely reserved "the right to tax persons and corporations, their franchises and property on the lands included in said parks" (304 U.S. at 525, n. 9).

provisions as are found in the Act * * * are unenforceable in the Park" (304 U.S. at 530). The Court rejected the State's argument that the Twenty-first Amendment gave it the right to place conditions upon the importation of intoxicating liquors into park land within its borders (304 U.S. at 538):

> As territorial jurisdiction over the Park was in the United States, the State could not legislate for the area merely on account of the XXI Amendment. There was no transportation into California "for delivery or use therein." The delivery and use is in the Park, and under a district sovereignty. Where exclusive jurisdiction is in the United States without power in the State to regulate alcoholic beverages, the XXI Amendment is not applicable.

While the Court in *Collins* upheld the fees and taxing aspects of the California statute, that was premised solely upon the State's express reservation of the right to tax when it ceded the lands to the United States (see note 7, *supra*).

Collins thus stands for the proposition that, in the absence of an express reservation, the State derives no power from the Twenty-first Amendment to regulate, whether by licensing, taxes, or other conditions, the importation of liquor into lands over which the United States has acquired exclusive jurisdiction. See, also, *Johnson* v. *Yellow Cab Transit Co.*, 321 U.S. 383.*

* In *Johnson*, Oklahoma state officers seized liquor in transit from an out-of-state source to consignees at Fort Sill, a military reservation within Oklahoma's boundaries. The carrier from whom the liquor was seized sued for its return. The Court noted that the state officials did not and could not claim

This is because the Amendment was designed only to permit the States to legislate with respect to alcoholic beverages, pursuant to their normal authority over public health, welfare, and morals, free from the constraints of traditional Commerce Clause limitations. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330; *California* v. *LaRue*, No. 71–36, decided December 5, 1972, slip op. at 5–6. The amendment does *not* expand the territorial jurisdiction of any State. *Collins* v. *Yosemite Park Co.*, *supra*, 304 U.S. at 538. Where liquor is not delivered or used within a State, the health, welfare, and morals of its citizens are not implicated, and the "broad sweep" of the Amendment (*California* v. *LaRue*, *supra*, slip op. at 5) [9] does not come into play.

b. We submit that *Collins* controls this case. Just as the importation of out-of-state liquor for delivery and sale within the exclusive federal enclave of Yosemite National Park was not importation "into California within the meaning of the Twenty-first Amendment" (304 U.S. at 535), so here the importation of out-of-state liquor into the military facilities over which the United States has exclusive jurisdiction was not importation into Mississippi. Similarly, since the "use"

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that "Oklahoma has power to control liquor transactions on the Fort Sill Reservation," because the State had ceded to the United States "whatever authority it ever could have exercised in the Reservation" (321 U.S. at 385).

[9] In *California* v. *LaRue*, this Court upheld a state regulation proscribing certain forms of entertainment in licensed bars and nightclubs. The case thus involved "state regulation in the area covered by the Twenty-first Amendment" (slip op. at 6). There was no question there, as there is here, of the State's territorial jurisdiction over the establishments regulated.

made of the imported liquor by the purchasing facility, like that of the Yosemite Park Company, is storage and sale within the base, the importation cannot properly be characterized as for "delivery or use" in Mississippi.

c. The court below distinguished *Collins* on the ground that there the "delivery and use [was] in the Park" (304 U.S. at 538), whereas here some of the liquor is consumed off base. In the court's view, "[t]he mere fact that the sales transactions took place on the military installation does not serve to insulate the club's right to purchase from the prohibition of the XXI Amendment" (J.S. App. 8a). The court erred, however, both in its reading of *Collins* and in its conclusion that off-base consumption by purchasers could justify state regulation of the transaction between the distiller and the military facility.

The Court in *Collins* did state that the "delivery and use [of the alcoholic beverages] is in the Park" (304 U.S. at 538); it did not suggest, however, that all the liquor brought into the park was actually consumed there as well. The record in *Collins,* like the record here, does not reveal the extent to which liquor sold on the federal lands was consumed in the State.[10]

[10] Liquor sold by the drink is, of course, ordinarily consumed on the premises. The record contains nothing concerning the extent to which packaged liquor is consumed elsewhere than on the bases. The district court inferred that some of the liquor is consumed off base because limited classes of nonmilitary persons are authorized to make purchases and because each selling facility requires purchasers to agree to obey state laws with respect to liquor consumed off base (J.S. App. 3a).

The effect of the court's judgment, however, is to permit "markups" on all liquor purchased for sale on the bases, in-

But the complaint in *Collins* acknowledged that liquor was sold "for consumption on or off the premises where sold" (Transcript of Record, p. 3, No. 870, O.T. 1937), and there is no reason to think that some was not consumed outside the park in California.[11]

The correct understanding of the Court's statement in *Collins,* therefore, is that, with respect to the transaction between the out-of-state manufacturer or distributor and the Yosemite Park Company, the "delivery" of the liquor and its "use" (*i.e.,* its storage and sale) occurred exclusively within the park. That some of the liquor might later be taken from the park by purchasers and "used" by them in California would not give the State authority to regulate the importation into the park. It would only permit the State to regulate the transportation of liquor from the park into California and its consumption there.

The analysis is identical here. The liquor purchased by the military facilities from out-of-state distillers is sold exclusively within the confines of the bases. The "delivery" and "use," with respect to that transaction, is therefore on federal lands and not in Mississippi. While the State may establish a regulatory

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cluding liquor sold by the drink and packaged liquor consumed on the bases. There is no foundation for such a conclusion, and at the very least a remand would be required here to determine the proportion of liquor sales that result in off-base consumption.

[11] This court's statement in *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332, that the shipment in *Collins* was "destined for distribution and consumption in a national park," apparently used the word "consumption" in the broad sense of retail purchase of consumer goods.

mechanism to ensure either that no liquor is taken from the bases or that any liquor leaving the bases is subjected to a "markup" charge, it cannot interfere with the sale and delivery of out-of-state liquor to facilities on the federal enclaves. Thus, contrary to the view of the court below, the fact that the sales take place on base *does* insulate the distiller-seller transaction from state regulation under the Twenty-first Amendment. Mississippi's power under that Amendment is limited to the regulation of the importation or use of the liquor in Mississippi by individual purchasers.

The State would, of course, have "wide latitude for regulation * * *." *Seagram & Sons* v. *Hostetter*, 384 U.S. 35, 42; *California* v. *LaRue, supra*, slip op. at 7. But there is no basis in this record for an assertion—not made by the court below—that the "markup" on the distiller-seller transaction is the only effective means of regulating the subsequent importation and use by individual purchasers. And even if the record demonstrated such a need, it is difficult to see why that would justify an otherwise impermissible extension of Mississippi's territorial jurisdiction. Surely if the liquor were being transported from Tennessee through Mississippi for delivery and sale by retailers in Louisiana, Mississippi would not and could not impose a "markup" on those transactions simply because some of the liquor might be brought by individual purchasers from Louisiana into Mississippi for consumption. Instead, Mississippi would be limited to regulating the actual importation into the

State by the individual purchasers, even if such direct regulation were difficult to accomplish effectively.[12] We think the same principles govern this case.

Since, therefore, Section 2 of the Twenty-first Amendment does not apply to the transactions between the distillers and the facilities on the Keesler and Naval Construction bases, Mississippi was without authority to regulate those transactions by imposing its "markups." Cf. *Humble Pipe Line* v. *Waggonner*, 376 U.S. 369; *Pacific Coast Dairy, Inc.* v. *Department of Agriculture*, 318 U.S. 285.

2. *Even if the Twenty-first Amendment might otherwise apply to the transactions here, it must yield to the superior authority of Congress to regulate federal enclaves.*

Even if it be assumed that there is an importation of liquor into Mississippi for delivery or use therein so that the Twenty-first Amendment might otherwise be applicable, that Amendment must yield here to the congressional authority to regulate federal enclaves. This Court held in *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, that,

[12] Although the Twenty-first Amendment is inapplicable to liquor shipments destined for federal enclaves or other states, Mississippi can exercise its police power to regulate such shipments while they are passing through her territory. *Duckworth* v. *Arkansas*, 314 U.S. 390; *Carter* v. *Virginia*, 321 U.S. 131. To be valid, however, such police regulation must be "in the interest of preventing * * * unlawful diversion [of the liquor] into the internal commerce of the State." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 333. Here, as in *Idlewild*, there is no evidence that any liquor has been diverted, and there is no claim that such diversion is the basis of the "markup" requirement.

because nothing in the language or history of the Twenty-first Amendment suggests a repeal of the export-import clause (Article I, Section 10, Clause 2), a state law conflicting with that clause was invalid notwithstanding the State's invocation of the Amendment. Here, too, the state regulation is invalid because it conflicts with the "explicit and precise" (377 U.S. at 346) constitutional grant to Congress of exclusive regulatory authority over federal enclaves and because nothing in its language or history implies a modification of Article I, Section 8, Clause 17.

The aim of the Amendment, as reflected in the congressional debates, was to confer upon the States the power—preempted by the federal government in the Eighteenth Amendment—to regulate commerce by individuals in alcoholic beverages notwithstanding potential Commerce Clause limitations. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 329–331. The sponsor of the resolution that became the Twenty-first Amendment explained that it would restore "to the States, in effect, the right to regulate commerce respecting a single commodity—namely, intoxicating liquor." 76 Cong. Rec. 4141 (remarks of Senator Blaine). See, also, 76 Cong. Rec. 4145, 4170, 4219 (remarks of Senators Wagner, Borah, and Walsh).

Decisions of this Court establish that the Twenty-first Amendment does not supersede "all other provisions of the United States Constitution in the area of liquor regulations" although "the broad sweep" of the Amendment confers "something more than the

normal state authority over public health, welfare, and morals." *California* v. *LaRue,* No. 71–36, decided December 5, 1972, slip op. at 5, 6.[13] The primary impact of the Amendment is upon the Commerce Clause; yet, even there, although the Amendment was intended to remove "traditional Commerce Clause limitations" restricting state regulation of liquor, this Court has emphasized that the Amendment has not "obliterate[d]" that clause. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra,* 377 U.S. at 329, 330. See also *Heublein, Inc.* v. *South Carolina Tax Commission,* No. 71–879, decided December 18, 1972, slip op. at 7–8, n. 9; *William Jameson & Co.* v. *Morgenthau,* 307 U.S. 171.

Just as the Twenty-first Amendment yielded in *Beam* to the export-import clause, so here it must give way to the specific and exclusive power of Congress to govern federal lands.

II

THE MISSISSIPPI REGULATION IMPOSES AN UNCONSTITUTIONAL TAX ON INSTRUMENTALITIES OF THE UNITED STATES

The fundamental principle that federal instrumentalities are immune from state taxation was first

[13] Unlike this case, where the State's regulation is meant only to raise revenue, *California* v. *LaRue* involved an effort by the state liquor commission to eliminate criminal and immoral behavior associated with the consumption of alcoholic beverages in establishments with certain forms of entertainment. There is here no such focus upon the welfare or morals of Mississippi's residents.

stated in *M'Culloch* v. *Maryland*, 4 Wheat. 316, where the Court struck down a state tax on the Bank of the United States. Although the reaches of that principle have expanded and contracted over the years,[14] the principle itself has never been questioned by this Court.

The court below did not expressly consider whether the Mississippi regulation imposed a tax on a federal instrumentality, deeming a decision on that issue unnecessary in view of its holding that the regulation is permissible under the Twenty-first Amendment (J.S. App. 11a–12a). In our view of the case, however, a holding that the Twenty-first Amendment is applicable to the military bases here does not obviate the taxation issue, because where the Twenty-first Amendment collides with the tax immunity principle, it must yield.

1. There is little question that the regulation requiring a "markup" on liquor purchased by military facilities imposes a tax on instrumentalities of the United States. Although its terms suggest a price regulation, the "markup" requirement operates as a tax. It is collected by the Tax Commission not in return for any services with respect to the liquor sold to the military facilities (App. 36), but rather as "an enforced contribution to provide for the support of government." *United States* v. *LaFranca*, 282 U.S. 568, 572. Profits from the collection of "markups"

[14] See, *e.g.*, Powell, *The Waning of Intergovernmental Tax Immunities*, 58 Harv. L .Rev. 633 (1945), and *The Remnant of Intergovernmental Tax Immunities*, 58 Harv. L. Rev. 757 (1945).

go into Mississippi's general revenues.[15] The appellees have accordingly conceded that "the 'mark-up' payments [collected from the military facilities] may be treated as an excise tax" (Motion to Affirm or Dismiss, p. 11).

Though the tax is paid directly by the distiller, the distiller acts only as a conduit in collecting the "markup" from the military facility. Like a state sales tax which must be collected by the seller from the purchaser and remitted to the State (see *First Agricultural National Bank* v. *State Tax Commission,* 392 U.S. 339, 347), the "legal incidence of the tax" falls on the purchaser—here the military facility.

Finally, the military facilities on which the tax is laid are instrumentalities of the United States. In *Standard Oil Co.* v. *Johnson,* 316 U.S. 481, and *Paul* v. *United States,* 371 U.S. 245, 261, this Court held that military post exchanges and commissaries are federal instrumentalities. Other courts have consistently held that the tax immunity of the United States applies to servicemen's clubs. *E.g., United States* v. *Query,* 37 F. Supp. 972 (E.D. S.C.), affirmed, 121 F. 2d 631 (C.A. 4), vacated on other grounds, 316 U.S. 486; *County of Culpeper* v. *Etter,* 231 F. Supp. 999

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[15] Memorandum in Support of Defendants' Motion for Summary Judgment, pp. 4–5. See Miss. Code Ann. 10265–115:

* * * * *

All taxes received by the Commission under this act shall be paid into the general fund as required by law. Any funds derived from the sale of alcoholic beverages in excess of inventory requirements shall be paid not less often than annually into the general fund.

(E.D. Va.); *Maynard & Child, Inc.* v. *Shearer*, 290 S.W. 2d 790 (Ky.); *Florida ex rel. C.P.O. Mess* v. *Green*, 174 So. 2d 546 (Fla.).[16] The appellees thus properly conceded in the district court that "[e]ach

[16] See, also, *Grant* v. *United States*, 271 F. 2d 651 (C.A. 2); *United States* v. *Holcombe*, 277 F. 2d 143 (C.A. 4); *Lowe* v. *United States*, 185 F. Supp. 189 (N.D. Miss.), affirmed, 292 F. 2d 501 (C.A. 5); *United States* v. *Forfari*, 268 F. 2d 29 (C.A. 9), certiorari denied, 361 U.S. 902; *Rizzuto* v. *United States*, 298 F. 2d 748 (C.A. 10); *Jaeger* v. *United States*, 394 F. 2d 944 (C.A. D.C.).

The status of post exchanges and other nonappropriated fund activities as instrumentalities of the United States is recognized also in 5 U.S.C. 2105(c).

It therefore cannot be said that the United States has consented to the Mississippi "markup" tax. It has given a general consent in 4 U.S.C. 105 to the imposition of "any sales or use tax" in federal areas, and "sales or use tax" is defined as "any tax levied on, with respect to, or measured by, sales, receipts from sales, purchases, storage, or use of tangible personal property * * *" (4 U.S.C. 110(b)). But that consent is qualified by 4 U.S.C. 107(a), which provides that Section 105 "shall not be deemed to authorize the levy or collection of any tax on or from the United States or any instrumentality thereof * * *."

The decision in *Polar Ice Cream & Creamery Co.* v. *Andrews*, 375 U.S. 361, is not to the contrary. The Court there stated, in a case to which the United States was not a party, that Florida could impose upon milk distributors a gallonage tax on milk distributed by them, including a portion sold to military installations within the State. In holding that 4 U.S.C. 105 was a consent to the tax so far as the federal government was concerned, the Court distinguished situations like that here, where "the tax was deemed to fall upon the facilities of the United States or upon activities conducted within these facilities" (375 U.S. at 382). The tax in *Polar* was on "the activity of processing or bottling milk in a plant located within Florida" (*ibid.*); the tax here falls upon the United States and attaches to the sale and delivery of liquor within the military facilities.

of these clubs is an instrumentality of the United States." [17]

The appellees have sought to avoid the conclusion that the "markup" is a tax on a federal instrumentality by characterizing the clubs as "a federally authorized retail business" (Motion to Affirm or Dismiss, p. 11). Even if the characterization were accurate, the clubs would still be immune from State taxation because

> * * all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation. * * * And when the national government lawfully acts through a corporation which it owns and controls, those activities are governmental functions entitled to whatever tax immunity attaches to those functions when carried on by the government itself through its departments. [*Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 477.]

In fact, however, the clubs, open messes, and package stores at the four Mississippi bases are not retail businesses. They are organized and operated pursuant to Air Force and Navy regulations, with an assigned mission of promoting the morale and efficiency of military personnel by providing lodging, dining, social, and recreational facilities (AFM 176–3, ¶1-1; NAVPERS 15951, ¶101).[18] They are not operated for

[17] Defendants' Opposition to Plaintiff's Cross Motion for Summary Judgment, p. 2.

[18] The applicable regulations are a part of this record, appearing as Exhibits 19 (AFR 176-1), 20 (AFM 176-3), and 21 (NAVPERS 15951) to the stipulation of facts.

the profit of any person or group (AFM 176–3, ¶8–3; NAVPERS 15951, ¶103(b)), and no individual has any financial or proprietary interest in the assets of the clubs (AFR 176–1, ¶13(a); NAVPERS 15951, ¶103(b)). Although the clubs are required to be self-sustaining, any operating gains are passed along to patrons in the form of reduced prices or dues (AFM 176–3, ¶8–3; NAVPERS 15951, ¶¶1005, 1009). And, though operated with nonappropriated funds, the clubs perform activities necessary to the proper functioning of the armed forces. Cf. 32 C.F.R. 538.1(c)(1).[19]

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[19] *Ohio* v. *Helvering*, 292 U.S. 360, upon which the appellees rely (Motion to Affirm or Dismiss, p. 7), is thus inapposite. The Court there upheld a federal tax on liquor dealers as applied to state liquor stores which sold to the general public for a profit. "When a state enters the market place seeking customers it divests itself of its *quasi* sovereignty *pro tanto*, and takes on the character of a trader, so far, at least, as the taxing power of the federal government is concerned" (292 U.S. at 369). See, also, *South Carolina* v. *United States*, 199 U.S. 437.

The military clubs here are engaged not in a profit-making enterprise as a "trader" with the general public but rather in the sovereign endeavor of maintaining the morale and efficiency of the armed forces.

This Court has recognized, moreover, that a state's immunity from federal taxation stands on a different footing than federal immunity from state taxation. See, *e.g.*, *Helvering* v. *Gerhardt*, 304 U.S. 405, 412–415; *New York* v. *United States*, 326 U.S. 572, 577 (opinion of Frankfurter, J.). "That the two types of immunity may not, in all respects, stand on a parity has been recognized from the beginning * * *." *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466, 478. See *M'Culloch* v. *Maryland*, 4 Wheat. 316, 435–436:

"The difference is that which always exists, and always must exist, between the action of the whole on a part, and the action of a part on the whole—between the laws of a government declared to be supreme and those of a government which, when in opposition to those laws, is not supreme."

2. If, as we have shown, the "markup" regulation imposes a tax on a federal instrumentality which, in the absence of the Twenty-first Amendment, would be unconstitutional, the remaining question is whether the subject matter of the tax—alcoholic beverages—vitiates the constitutional immunity. When a State's power to regulate alcoholic beverages under the Twenty-first Amendment collides with a conflicting interest under the Constitution, "each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 332. In our view a consideration of the Twenty-first Amendment in light of the fundamental constitutional principle of federal tax immunity, and in light of the interests at stake in this case, indicates that the tax imposed here cannot stand.

Though the Constitution contains no clause providing federal tax immunity, this Court has recognized from the start that the doctrine is deeply rooted in the concept of federalism. The state tax struck down in *M'Culloch* v. *Maryland*, 4 Wheat. 316, 425, was "in its nature incompatible with, and repugnant to, the constitutional laws of the Union." Federal tax immunity is "the unavoidable consequence of that supremacy which the constitution has declared" (*id.* at 436). This doctrine has been aptly described as "one of the cornerstones of our constitutional law." *Spector Motor Service* v. *O'Connor*, 340 U.S. 602, 610.

To sustain the Mississippi "markup" as applied to military clubs would require a holding that the Twenty-first Amendment abrogated the tax-immunity principle so far as intoxicating liquor is concerned. Cf. *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341, 345. One would expect that before the Congress and the state legislatures were to alter so fundamental an incident of federalism they would have clearly expressed the intention to do so. Yet nothing in the language of the Amendment or in its history suggests even an awareness of that consequence, much less a purpose to accomplish it.

The principal objective of the Amendment was to free the States to regulate commerce in alcoholic beverages without Commerce Clause constraints (see pp. 25–26, *supra*). In the House, it was recognized that the Amendment would not alter the principles of federalism. Repeal of the Eighteenth Amendment "does not seek to change the fundamental law which was subscribed to by Washington, Franklin, Madison, Hamilton and the other immortals of the Constitutional Convention," but rather would be a "return to the federated Republic which they founded * * *." 76 Cong. Rec. 4513 (remarks of Representative Beck). See, also, 76 Cong. Rec. 4514, 4520 (remarks of Representatives Dyer and Cole). It was noted also that the Twenty-first Amendment would be of financial advantage to the United States, which could eliminate the expense of enforcing prohibition while at the same

time raising tax revenues on liquor. See 76 Cong. Rec. 4148, 4508, 4510 (remarks of Senator Wagner and Representatives Rainey and Lichtenwalner). No offsetting loss of federal tax immunity was mentioned.

Where the Twenty-first Amendment was invoked to support a state law which conflicted with the export-import clause (Article I, Section 10, Clause 2), this Court, concluding that the language and history of the Amendment do not suggest a repeal of the clause, held that the Amendment is subordinate. *Department of Revenue* v. *James B. Beam Distilling Co., supra.* On the same analysis, the Amendment must yield here to the fundamental principle that a state may not tax an instrumentality of the United States.

This is particularly so in the circumstances of this case, for the "markups" imposed by Mississippi are not designed to protect the health, welfare, or morals of its citizens but rather to raise revenue by taxing liquor sales to military personnel. Were the Mississippi measure related to the health or welfare of its citizens and were the federal instrumentality engaged in a less significant enterprise than promoting the morale and efficiency of the armed forces, the resolution of the constitutional issue might be a more difficult one. Applying the tax immunity doctrine here, however, does not interfere with the kind of state regulation that the Twenty-first Amendment was principally designed to protect. Cf. *Hostetter* v. *Idlewild Bon Voyage Liquor Corp., supra*, 377 U.S. at 333–334.

III

THE MISSISSIPPI REGULATION IS INVALID UNDER THE SUPREMACY CLAUSE BECAUSE IT CONFLICTS WITH FEDERAL PROCUREMENT REGULATIONS AND POLICY

Paul v. *United States, supra,* further indicates that the Mississippi regulation is invalid under the Supremacy Clause because it conflicts with federal procurement regulations and policies. In addition to its ruling with respect to the application of Article I, Section 8, Clause 17, to milk purchased by military installations with nonappropriated funds (see pp. 13–17, *supra*), the Court in *Paul* also invalidated the application of California's minimum price regulation to milk purchased by those installations with appropriated funds. That application of the California regulation was invalidated under the Supremacy Clause because it conflicted with federal procurement law and policy, which required price competition "so that the United States may receive the most advantageous contract" (371 U.S. at 253). The Court stated (*ibid.*):

> While the federal procurement policy demands competition, the California policy, as respects milk, effectively eliminates competition. The California policy defeats the command to federal officers to procure supplies at the lowest cost to the United States by having a state officer fix the price on the basis of factors not specified in the federal law.

There was accordingly, the Court held, a clear and acute "collision between the federal policy of negoti-

ated prices and the state policy of regulated prices."

The federal procurement regulation involved in *Paul* reflected "a policy 'to use that method of procurement which will be most advantageous to the Government—price, quality, and other factors considered'" (371 U.S. at 252). The regulation tracked the general procurement statute, which applies only to payments out of appropriated funds (10 U.S.C. 2303(a)), requiring that awards be made "to the responsible bidder whose bid * * * will be the most advantageous to the United States, price and other factors considered." 10 U.S.C. 2305(c). That regulation, the Court held, "directs that negotiations or, wherever possible, advertising for bids shall reflect active competition" (371 U.S. at 253).

The regulations governing the procurement of alcoholic beverages for military installations similarly reflect a federal policy of requiring that the United States purchase this product at "the most advantageous contract" (*Paul, supra,* 371 U.S. at 252). Although there is no specific federal statute governing the procurement involved in this case, since it is made from nonappropriated funds, Congress has authorized the Secretary of Defense to regulate "the sale, consumption, possession of or traffic in" liquor on military bases. 50 U.S.C. App. 473.[20] Pursuant to this broad authority, the

[20] The section provides:

"The Secretary of Defense is authorized to make such regulations as he may deem to be appropriate governing the sale, consumption, possession of or traffic in beer, wine, or any other intoxicating liquors to or by members of the Armed Forces or the National Security Training Corps at or near any camp,

Secretary has promulgated regulations establishing a uniform Defense Department policy governing the purchase and sale of alcoholic beverages. 32 C.F.R. 261.

Those regulations direct that "the purchase of all alcoholic beverages for resale at any * * * base * * * shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered." 32 C.F.R. 261.4(c)(1).[21] This language closely parallels that of the general procurement regulation involved in *Paul,* which called for the "method of procurement which will be most advantageous to the Government—price, quality, and other factors considered" (371 U.S. at 252), and similarly reflects a federal policy that the government procure this commodity at the most advantageous price. The regulation governing the procurement of alcoholic beverages also states that, although it is the policy of the Defense Department to cooperate with local, state, and federal officials, such cooperation does not reflect "any legal

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station, post, or other place primarily occupied by members of the Armed Forces or the National Security Training Corps. Any person, corporation, partnership, or association who knowingly violates the regulations which may be made hereunder shall, unless otherwise punishable under the Uniform Code of Military Justice, be deemed guilty of a misdemeanor and be punished by a fine of not more than $1,000 or imprisonment for not more than twelve months, or both."

[21] The subsection provides in full:

"(c) *Cooperation.* (1) DoD will cooperate with all duly constituted regulatory officials (local, state and Federal) to the degree that the duties of such officials are related to the furtherance of the terms of this part. However, the purchase of all

obligation to submit to State control." 32 C.F.R. 261.4 (c)(2).[22]

There is no question concerning the validity of this regulation. Inexpensive liquor is one of several economic benefits for servicemen which are designed to make enlistment attractive and to maintain high morale and efficiency in the Armed Forces (App. 40). Congress has broad authority under Article I, Section 8, to "raise and support Armies," to "provide

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alcoholic beverages for resale at any camp, post, station, base or other place primarily occupied by members of the Armed Forces within the United States shall be in such a manner and under such conditions as shall obtain for the Government the most advantageous contract, price and other factors considered.

"(2) This policy of cooperation is not to be construed or represented as an admission of any legal obligation to submit to State control."

[22] See note 21, *supra*. Prior to 1966, the regulation was even more explicit. It directed military facilities to obtain "the most advantageous contract, price and other factors considered, *without regard to prices locally established by state statute or otherwise*." 32 C.F.R. 261.4(c)(1) (1966 rev.) (App. 32). The Defense Department memoranda (App. 42–57) recommending the deletion of the italicized clause show that the purpose was solely to correct the misunderstanding of some clubs that the clause barred them from procuring liquor from monopoly or control states even if the state price was the most advantageous. In explaining the change, the Assistant Secretary of Defense for Manpower stated: "[i]t would * * * remove any possible implication that negotiation with a state official must be avoided" (App. 57).

The amendment to the regulation thus left unchanged the basic procurement policy of seeking the lowest competitive price and the most favorable terms. It in no way implied a submission to state regulation or price control.

and maintain a Navy," and to regulate "the land and naval Forces," as well as authority under Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States." This power authorizes the Secretary of Defense, pursuant to his delegated authority, to regulate "the sale, consumption, possession of or traffic in" liquor on military bases, to require that procurement of liquor there be at the lowest possible price.

As in *Paul,* the state policy here conflicts with the federal policy. Like the minimum price regulation there, the "markup" here frustrates the federal objective of obtaining the most favorable terms; it artificially inflates by 17 to 20 percent the price at which the military facilities could otherwise obtain their liquor. In effect, it sets a floating minimum price level which is 17 to 20 percent above the "most advantageous" price.

In these circumstances, we submit that, apart from the Twenty-first Amendment, the Supremacy Clause would bar Mississippi from applying its markup regulation to the alcoholic beverages purchased by the two military installations over which the State and the United States have concurrent jurisdiction. In addition to the *Paul* case, see *Public Utilities Commission* v. *United States,* 355 U.S. 534, where the Court held that California could not prohibit common carriers from transporting government property at rates

other than those approved by its Public Utilities Commission, because that prohibition conflicted with government procurement law and regulations requiring negotiated rates and the use of the " 'least costly means of transportation' " (see 355 U.S. 542).[23] See, also, *Johnson* v. *Maryland,* 254 U.S. 51, invalidating a state law penalizing a Post Office employee for operating a government vehicle without a state license, and *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187, holding that a State may not require a government contractor to

[23] *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U.S. 261, is not to the contrary. The Court there upheld Pennsylvania's refusal to renew the license of a milk dealer who had sold milk to a military facility at bid prices lower than the statutory minimum. The federal regulation there, unlike that here, contained an exception to the general policy of competitive procurement " 'when the price is fixed by federal, state, municipal or other competent legal authority.' " See 318 U.S. at 277. It contained also provisions manifesting a "hands off" policy with respect to state minimum price laws. *Id.* at 276, 278. It was on this basis that the Court in *Paul* distinguished *Penn Dairies.* See 371 U.S. at 254–255.

To the extent that *Penn Dairies* required, before finding a conflict between federal and state policy, unambiguous "evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable" (318 U.S. at 275), we think the decision has been eroded by *Public Utilities Commission* and *Paul.* In both cases, the Court was able to discern such a conflict on virtually no stronger indication of congressional purpose than was deemed insufficient in *Penn Dairies.* See 355 U.S. at 547–548 (Harlan, J., dissenting); 371 U.S. at 270–283 (Stewart, J., dissenting).

obtain a license prior to executing the contract and performing construction work on an Air Force base within the State. As this Court stated in *Johnson,* a State may not impose "qualifications in addition to those that the Government has pronounced sufficient" (254 U.S. at 57).

The question, therefore, is whether the authority of the states under the Twenty-first Amendment to regulate traffic in alcoholic beverages prevails over the federal government's broad authority to govern the military forces. Once again, as in the case of the exclusive federal authority over enclaves under Article I, Section 8, Clause 17, we submit that the federal authority is paramount. There is nothing in the history of that Amendment to suggest that it was intended to diminish congressional authority to regulate military affairs. For the same reasons that the Twenty-first Amendment was subordinated to the export-import clause in *Beam, supra,* it must yield here to the "explicit and precise" (377 U.S. at 346) grants of authority to Congress to govern the armed forces and military installations of the United States.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded with directions to enter an appropriate decree.[24]

Respectfully submitted.

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[24] The concurring opinion below suggested that a refund would be barred here because the "markups" were paid voluntarily (J.S. App. 14a–19a). Refund suits, however, are a common method of challenging the validity of a tax. See *e.g.*, *Department of Employment* v. *United States*, 385 U.S. 355; *Department of Revenue* v. *James B. Beam Distilling Co.*, 377 U.S. 341. The "mark-ups" here were paid under protest, and to deny the right to recover such payments if they are held to have been improperly exacted would depart from settled principles of fairness and restitution. See, *e.g.*, *Arkadelphia Milling Co.* v. *St. Louis, S. W. Ry. Co.*, 249 U.S. 134; *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

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